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MISSISSIPPI TAX CASES.

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OCTOBER TERM, 1899.

Filed April 16, 1900.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,

vs.

WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
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For Plaintiffs in error.

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Of counsel.

WASHINGTON, April 12, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 324.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,

vs.

WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

Under the heading of "subsequent laws," the defendant in error in his brief concedes as follows (p. 5):

> "The laws under which the revenue agent is proceeding in this case are sections 3875–3886 of the Code of 1892 and the revenue agent act of 1894, in Laws of 1894, pp. 29–31."

In view of this concession, how can it possibly be doubted that recovery under these laws of 1892 and 1894 is an impairment by virtue of subsequent legislation of the charter exemption granted in 1882? The case is very much stronger in this respect than *Yazoo Railroad Co.* v. *Thomas*, 132 U. S. 174, and *Houston & Texas Central Railroad* v. *Texas*, decided at this term. Besides, the taxes sued on are indisputably levied under laws passed since 1882.

II.

The questions arising under the present writ of error will, it is assumed, be decided upon this record and not upon what is established in other cases. Any attempt to draw the facts in No. 244 into this case should be

unavailing. Besides, the municipal taxes here in question were not involved in that case, although other municipal taxes may have been, nor was this provision of the Yazoo Company's charter in any sense presented or involved in that litigation. It is, therefore, difficult to understand the point of the suggestion of the defendant in error that the decision in No. 244 constitutes *res adjudicata*.

Indeed, this suggestion must have been inadvertently made. Any municipal taxes involved in No. 244 related entirely to the road of the Louisville, New Orleans and Texas Railway Company, and in no respect to the road of the Yazoo Company. The right or privilege of appropriation claimed in No. 244 concerns the road of the L., N. O. & T. Company and is entirely distinct and separate from the exemption contained in the Yazoo charter, which affects solely the road of the Yazoo Company. The railroad companies in No. 244 did not contend and have never pretended that under the consolidation of 1892 the exemption in the Yazoo charter expanded so as to cover and include within its scope the roads of the other constituent companies. No such point could possibly have been made in view of the wording of the Yazoo charter, which provides as follows (see appendix, p. ii):

> "The consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; *but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered.*

III.

A reference to the opinions delivered by Whitfield, J., in the state court (record, pp. 7–9, 43–44), will show conclusively that the court below decided neither that the exemption in the Yazoo charter had been repealed nor

that the consolidation created a new corporation which was not entitled to receive the exemption. It was assumed that the exemption continued "in full force and effect" by virtue of the constitution of 1890. But, as these points are now urged by the defendant in error, we may briefly consider them.

The court will observe that the defendant in error stands upon the decision in the *Mississippi Mills* case when needed to help his argument and to establish that the exemption was repealable, but casts it aside whenever it helps the railroad company. If the *Mississippi Mills* case is to be taken as sound, notwithstanding that it has been expressly overruled in No. 244, it would then conclusively follow that the legislature had power under the constitution of 1869 to grant repealable exemptions, and that, as the Yazoo exemption was not repealed, there must be, without further argument, a reversal of the judgment below in respect of the taxes from 1886 to 1892, inclusive, which accrued prior to the consolidation, but which were nevertheless included in the judgment below.

The defendant's plea on the question of repeal is as follows (record, p. 22):

> "And the said defendant further avers that the said exemption by said charter conferred has never been repealed by the legislature of said State, but, on the contrary, at the sessions of said legislature held in the years 1886, 1888, 1890, and 1896 respectively members of that body introduced bills therein whereby said exemption should be repealed, but said legislatures each and respectively refused to pass the same or any of them, and said charter exemption still stands unrepealed and not in any way modified by said State legislature."

This plea was demurred to by the state revenue agent, plaintiff below (*id.* p. 23), and the demurrer was sustained by the court (*id.* p. 24). Subsequently, the parties stipulated as follows (*id.* p. 42):

"First. That the appellee in the court below demurred generally to the second plea of the appellant, and that the court sustained such demurrer, and an order was duly entered to that effect, which should appear in the transcript, and that this order shall be considered as in the transcript."

This plea was overruled because it was held that the exemption as to municipal taxes was conditional upon the completion of the road to the Mississippi river, and had never been earned by fulfilling that condition, and not upon any idea that the exemption had been repealed.

It is difficult to answer a statement that the exemption was "repealed by the laws of 1882 and Code of 1892" (defendant's brief, p. 5), followed by a reference (p. 8) to numerous other statutes, none of which is quoted as required by the rule. If this point was made below, the court overruled it, for if this exemption had been clearly repealed, and it had been so held by the same court in No. 244 on this calendar, of course there would have been no necessity to consider the case on the merits and interpret the statute. To urge at this time that the decision of the state court that a contract has been repealed is conclusive upon this court in a contract case, and precludes argument, should try the patience of a court which at every term, and with great labor, is compelled to reiterate that "it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below."[1]

As to the effect of the agreement of consolidation, it is proper to emphasize the fact that the agreement is not in this record, and that the consolidation was not men-

[1] Mr. Justice Peckham in *Houston & Texas Central Railroad* v. *Texas* at this term.

1038

tioned as a ground of decision by the court below. The revenue agent saw fit below to refrain from bringing before the court the agreement of consolidation. The reason is obvious. He wanted the advantage of recovering upon a theory which would render the railroad company liable for back taxes for the seven years prior to the consolidation. The original declaration in the case at bar was filed July 7, 1897 (record, pp. 1–4), and sought to recover back taxes for the years 1893, 1894, 1895 and 1896. The amended declaration was filed February 9, 1898, and presented additional claims for the taxes for the years 1886 to 1892, both inclusive, and for the year 1897 (*id.*, pp. 11–16). The action was thus for taxes for twelve years, seven of which accrued prior to the merger or consolidation which took place on October 25, 1892 (*id.*, p. 17). The only allegations in the case as to consolidation are to be found in the pleas of the railroad company (*id.*, pp. 17, 18), and they tend to show a mere merger and transfer without the creation of a new corporation. Indeed, the record indicates most persuasively that there was no claim below that the consolidation had created a new corporation, for in the "agreed statement of facts," which is binding here as well as below, the following language is used (*id.*, p. 20):

> "It is agreed between the respective parties to the above cause that *the defendant*, The Yazoo & Mississippi Valley Railroad Company, was chartered in the year 1882 under the laws of the State of Mississippi," etc.

If it had been intended to insist upon any limitation or extinction of the charter rights caused by the consolidation of 1892, different language would surely have been used than can be found in this record; but the state revenue agent saw fit and elected—and this after a litigation of nearly one year and after a decision on the merits in his favor by the highest court—to rest his case upon

the charter of 1882 and its interpretation alone. It does not now lie with him, under well-settled rules, to assert that under the consolidation agreement, which he deliberately elected not to prove, a new corporation was created. And no presumption exists that such was the fact. It is well settled that a consolidation might be effected which would constitute merely a merger, and not result in the death or dissolution of the Yazoo Company. In view of the peculiar wording of the pleadings and agreed statement of facts in this case, as framed by the consent and action of the state revenue agent in demurring to the plea, there is nothing before the court tending to establish that the consolidation of 1892 resulted in the creation of a new corporation.

IV.

If, nevertheless, it can fairly be said that the interpretation and effect of the consolidation agreement of 1892 are before the court in this case, it is then submitted that the exemption in the Yazoo Company's charter passed to the consolidated company, and that, even if a new corporation resulted from the consolidation, the exemption was continued by virtue of section 181 of the constitution of 1890, subject, however, to repeal by the legislature. The intention of the constitution was to continue existing exemptions "in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature." In this respect we find the radical difference between this case and the constitution of Missouri involved in the case of *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, for there was no clause in that constitution declaring that existing exemptions should "remain in full force and effect" until repealed

by the legislature. As matter of fact, the legislature of Mississippi has repeatedly declined to repeal these exemptions, which fact was distinctly pleaded (record, p. 22).

The charter of the Yazoo Company confers the authority to consolidate in the following language (see appendix, p. ii):

> "Said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; and it may lease its railroads and all its property and franchises, rights, powers, privileges and immunities then owned or thereafter to be acquired, or lease other railroads in or out of this State, for a term of years or in perpetuity, and upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company."

There can be no reasonable doubt from this language that it was clearly the intention of the legislature to include the exemption from taxation in the provision that "the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted." Otherwise, there would have been no sense in the two clauses which limited the exemption from taxation to the original company's property.

In view of this language of the statute and of the evident intention of the legislature that all the rights, privileges, liberties and immunities of the Yazoo Company, including the exemption, should pass to and vest in the consolidated company, there can be no doubt that the case

of *Tennessee* v. *Whitworth*, 117 U. S. 139, 145, is exactly in point. In that case Chief Justice Waite said:

> "As early as 1850, before either the charter of the Tennessee and Alabama Company or that of the Central Southern Company was granted, this court said in *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Maryland*, 10 How. 376, 393, speaking by Mr. Chief Justice Taney, that a statute which authorized the union of two railroad companies, and secured to the united company the 'property, rights and privileges which that law, or other laws, conferred on them [the separate companies], or either of them,' extended to the united company an exemption from taxation in the charter of one of the uniting companies, and this although it was at the same time said that 'the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms.' This has been expressly reaffirmed in *Tomlinson* v. *Branch*, 15 Wall. 460; *Humphrey* v. *Pegues*, 16 Wall. 244; *Southwestern Railroad* v. *Georgia*, 92 U. S. 676; and the correctness of the decision was recognized in *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665; *Morgan* v. *Louisiana*, 93 U. S. 217; *Railroad Companies* v. *Gaines*, 97 U. S. 697, 711; *Railroad Co.* v. *Georgia*, 98 U. S. 359, 360; *Railroad Co.* v. *Hamblen*, 102 U. S. 273, 277; *Railroad Co.* v. *Commissioners*, 103 U. S. 1, 4; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244, 253; and *Chesapeake & Ohio Railroad Co.* v. *Miller*, 114 U. S. 176, 185.
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> "From this it is clear that, under the settled rule of decision in this court, the exemption from taxation, which was one of the 'rights and privileges' of the Nashville and Chattanooga Company, formed part of the charters of the Tennessee and Alabama Company and the Central Southern Company, unless a different rule is to be applied in Tennessee, because of a supposed limitation on the popular meaning of the words 'rights,' 'powers' and 'privileges' when used in statutes, on account of a peculiar provision of the constitution of that State."

And this authority was not overruled by *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301.

Morever, the consolidation in the case at bar did not result in the creation of a new company, for that was not the intention of the parties, and such a conclusion would

be in direct conflict with the language used in the consolidation agreement.

If, nevertheless, it can be said that the consolidation of 1892, under the circumstances, created an entirely new corporation, it remains to be considered whether that new company would be entitled to receive the exemption which was enjoyed by the original Yazoo Company as to its property. It is submitted that the new company would be authorized to enjoy the exemption.

When the consolidation took place, the Yazoo Company was entitled to a perpetual exemption as to municipal taxes. If the constitution had sanctioned exemptions in the future, so that such an exemption as was granted to the Yazoo Company in 1882 could have been likewise granted under the constitution of 1890, there would be no reasonable doubt that the new corporation would be entitled to enjoy the existing exemption. It is only an absolutely inconsistent intervening constitutional provision that would prevent the immunity from passing to the new company within the doctrine of the *Keokuk* case.

Now, the framers of the constitution of 1890 had these exemptions in mind, and expressly preserved them in section 181, subject, however, to the condition that they should be repealable by the legislature. The framers also knew that these corporations had been authorized to consolidate upon terms which would transfer and carry to the consolidated company the immunity from municipal taxes contained in the Yazoo charter. They declared that that exemption "shall remain in full force and effect" until repealed. We should read this provision into the agreement of consolidation, and thus preserve what the framers of the constitution so clearly intended to protect. In other words, the effect of the constitution of 1890 was

substantially this and no more, namely, that any new corporation organized by consolidation after the adoption of that constitution would have to take existing irrepealable exemptions subject to their being repealed by the legislature. When the consolidation of 1892 was effected, if it created a new corporation, the new corporation took the immunity subject to repeal, although not subject to repeal if no consolidation had been had. If the new constitution, as in the constitution of Missouri in the *Keokuk* case, had expressly provided that there should be no exemptions, then the pre-existing exemptions in the Yazoo charter could not have been transferred to a new company. Had there been, in the *Keokuk* case, an express reservation of existing exemptions and a declaration that they should "remain in full force and effect," coupled with an existing express power to consolidate and transfer the exemption, it cannot be doubted that the conclusion then would have been that the new company was entitled to the benefit of the pre-existing exemption, subject to any conditions contained in the new constitution. This interpretation of the constitution of 1890 is in all probability the true intention of the framers and the reason for the peculiar language used, which, of course, must be considered in connection with the existing statute providing, as we have seen, for the transfer of the exemption to the consolidated company.

Washington, April 12, 1900.

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APPENDIX.

CONSTITUTION OF 1890.

Provision continuing exemption from taxation.

SECTION 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature. And domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies doing business in this state, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies; and the legislature may impose privilege taxes on building and loan associations in lieu of all other taxes except on their real estate.

CHARTER OF YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.[1]

An Act incorporating the Yazoo and Mississippi Valley Railroad Company, and declaring its powers, approved February 17, 1882.

SEC. 5. *Be it further enacted*, That said company may, from time to time, mortgage or convey in trust any or all of its property, real, personal and mixed, of any and every description whatsoever, then owned or thereafter to be acquired, and also all or any of its rights, powers, privileges, liabilities, immunities and franchises whether then owned, possessed and enjoyed or thereafter to be acquired, including its rights to be a corporation; and under such deed or deeds of trust or mortgage secure, execute and dispose of the mortgage bonds of said company, to such amounts and maturing at such times and bearing such interest as it may deem best; said company may also execute a mortgage or mortgages and trusts as aforesaid, to secure bonds or obligations of other railroad companies, or may endorse the bonds of any other railroad company or com-

[1] Section 8 of the Yazoo Company's charter, containing the exemption, is printed at length in the main brief, pp. 1, 2.

panies; or in any other manner guarantee such bonds and secure the same by a mortgage or mortgages on its own property and franchises, then owned or thereafter to be acquired, as fully as it could do if the bonds were issued by it as aforesaid; said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; and it may lease its railroads and all its property and franchises, rights, powers, privileges and immunities then owned or thereafter to be acquired, or lease other railroads in or out of this State, for a term of years or in perpetuity, and upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company; and in case of a lease, the lease (lessee) shall, so far as the terms of the lease may allow, enjoy and possess all the property, rights, powers, privileges, liberties, immunities and franchises which the lessor had as to the leased premises; the said company is also authorized to do an express business over its own and other lines of railroad and steamboats or other conveyances in and out of this State; and to acquire or put up, use and operate a line or lines of telegraph in this and other State or States, and to acquire, hold and enjoy all such property as may be proper, necessary or convenient in doing the said express or telegraph business: *Provided*, that by such consolidation the maximum in section six applies only to roads hereafter built. Laws Mississippi, 1882, p. 842.